TNEU BEH

v.

TANJONG KELAPA SAWIT SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
HASHIM YUSOFF JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: W-02-98-2004]
14 OCTOBER 2004

CIVIL PROCEDURE: *Receiver - Appointment - Appeal against - Affidavit of fitness not filed in support of application for appointment - Whether learned judge erred in appointing receiver - Rules of the High Court 1980, O. 30*

This was the appellant's appeal against the appointment of a receiver, one Mr Sathiea Seelan Manickam ('Mr Sathiea') pursuant to O. 30 of the Rules of the High Court 1980. The appellant argued that the learned judge erred in his discretion in the appointment thereof as no affidavit of fitness was filed in support of the application for appointment.

Held (dismissing the appeal):
Per Nik Hashim JCA delivering the judgment of the court:

[1] Taking into account all the relevant principles and circumstances of the case, there were sufficient materials to support the learned judge's finding in appointing Mr Sathiea as the receiver. Except for the affidavit of fitness, the affidavits evidencing his identity and his willingness to act were filed in court. Also, the supporting affidavits of the 2nd, 3rd and 4th respondents were sufficient proof to establish that he was a qualified and a fit person to be appointed as a receiver. Accordingly, the failure to file an affidavit of his fitness did not vitiate the appointment. Further, the facts showed that he was a partner of the accounting firm of Anuarul Azizan Chew & Co; that he was a member of the Malaysian Institute of Accountants; and that he had a liquidator's license pursuant to s. 8(3) of the Companies Act 1965. Those facts were not challenged. Neither was there any evidence to show that he was incompetent and that his appointment would not

ensure an independent and objective assessment, valuation and distribution of the properties concerned. The fear of the appellant of any impartiality was therefore misplaced as he was policed by the court and all parties were at liberty to apply to the court for any directions and orders should the need arise. In addition, Mr Sathiea remained the most suitable candidate in the interest of all parties. His fees were reasonable given the scope of work compared to the appellant's candidates whose fees were uncertain and based on time costs. It followed that the learned judge was wholly correct in the exercise of his discretion in the appointment of Mr Sathiea as receiver. (pp 634 f-h & 635 a-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu terhadap perlantikan seorang penerima bernama Sathiea Seelan Manickam ('En Sathiea') mengikut A. 30 Kaedah-Kaedah Mahkamah Tinggi 1980. Perayu mendakwa bahawa hakim yang arif tersalah dalam budibicara perlantikan tersebut kerana tiada afidavit kesesuaian (affidavit of fitness) yang difailkan bagi menyokong permohonan perlantikan tersebut.

Diputuskan (menolak rayuan):
Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

[1] Dengan mengambilkira semua prinsip-prinsip berkenaan dan keadaan kes semasa, terdapat material mencukupi yang menyokong pendapat hakim yang arif dalam perlantikan En Sathiea sebagai penerima. Kecuali afidavit kesesuaian, afidavit-afidavit identiti dan kerelaan En Sathiea untuk bertindak sebagai penerima telah difailkan. Lagi, keterangan melalui afidavit-afidavit sokongan responden kedua, ketiga dan keempat mencukupi untuk membuktikan bahawa beliau berkelayakan dan sesuai untuk dilantik sebagai penerima. Kegagalan memfail afidavit kesesuaian tidak mentaksahkan perlantikan tersebut. Fakta-fakta menunjukkan bahawa beliau adalah rakan kongsi firma akauntan Anuarul Azizan Chew & Co, ahli 'Malaysian Institute of Accountants' dan pemegang lesen likuidator selaras dengan s. 8(3) Akta Syarikat 1965. Fakta-fakta tersebut tidak dicabar. Tiada juga keterangan menunjukkan bahawa En Sathiea tidak berkompeten dan perlantikannya tidak akan menentukan penilaian yang bebas dan objektif terhadap pembahagian harta berkenaan. Dengan itu kebimbangan perayu terhadap

apa-apa kesaksamaan tidak berasas disebabkan perlantikan Mr Sathiea melalui mahkamah membenarkan pihak-pihak terlibat bebas memohon ke mahkamah untuk apa-apa arahan dan perintah jika perlu. Tambahan lagi, En Sathiea merupakan calon yang sesuai sekali demi kepentingan semua pihak-pihak. Bayarannya munasabah memandangkan skop kerjanya berbanding dengan calon-calon perayu yang mengenakan bayaran yang tidak tertentu dan yang berasaskan kos masa. Maka, hakim yang arif betul dalam pelaksanaan budibicaranya melantik En Sathiea sebagai penerima.

Case(s) referred to:
Lee Choo Yam Holdings Sdn Bhd & Ors v. Khoo Yoke Wah & Ors [1989] 1 CLJ 946; [1989] 2 CLJ (Rep) 52 HC ***(refd)***
Ratnam v. Cumarasamy & Anor [1965] MLJ 228 ***(refd)***
Vasudevan v. T Damodaran & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 8(3)
Rules of the High Court 1980, O. 30 r. 1(1)

Other source(s) referred to:
Corporate Receivership – The Law and Practice in Malaysia and Singapore 1997, pp 417-418
Malaysian High Court Practice – 2001 Desk Edition, pp 1040-1060

For the appellant - KS Narayanan (Anthony Leong, Ranjit Kaur); M/s Riza Leong & Partners
For the 2nd respondent - MK Yee (Elizabeth Loo); M/s Shearn Delamore & Co
For the 3rd & 4th respondents - Ben Chan (Noor Rossyda Osman); M/s Lee Hishammudin

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim JCA:

The Background

This appeal concerns the appointment of a receiver pursuant to O. 30 of the Rules of the High Court 1980 (the RHC). By an order dated 13 January 2004, the High Court appointed one Mr. Sathiea Seelan Manickam to be the receiver over all the properties and assets as provided in a separate order of the High Court dated 18 July 1994.

The background of this action involves property dispute between the parties who are family members and the dispute resulted in 18 July 1994 order which allowed the respondents' counterclaim including the appointment of a receiver. The 2nd respondent thereafter filed an application for appointment of Mr. Sathiea as the receiver on 16 May 2002. The appellant opposed this application and proposed to appoint one of the big three accounting firms to undertake the tasks of a receiver whereas the 3rd and 4th respondents supported the appointment of Mr. Sathiea as the receiver. It is to be noted that the appellant is the eldest brother to the 2nd, 3rd and 4th respondents.

Mr. Sathiea is a partner of the Chartered Accountancy firm of Messrs Anuarul Azizan Chew & Co., which is a member firm of Morison International. He is the holder of a liquidator's license issued pursuant to s. 8(3) of the Companies Act 1965 (the Act) by the Minister of Finance. He is also a member of the Malaysian Institute of Accountants and is qualified to undertake the task of a receiver.

Mr. Sathiea has consented to be appointed as a receiver and set out his scope of work and professional fees of not exceeding RM80,000.

Having considered the evidence and submissions of counsel from all the parties, the learned High Court judge exercised his discretion to appoint Mr. Sathiea as the receiver and the terms of the appointment have been set out in 13 January 2004 order. Mr. Sathiea has been acting as the receiver over the assets and properties since that date and there is no order for stay.

The Contention And Issue For Determination

Before us, learned counsel for the appellant argued that the learned judge had not exercised his discretion correctly in appointing Mr. Sathiea as the receiver as there was no affidavit of fitness filed in support of the respondents' application for appointment of their nominated receiver, Mr. Sathiea, whilst the appellant's nominees had the affidavit of fitness. Thus, the respondents' application was flawed as there was insufficient evidence and material before the learned judge to exercise his discretion properly in favour of the respondents' nominee.

The question for determination in this appeal is whether in the circumstances of this case in the light of the relevant principles of law there are grounds for us to interfere with the exercise of his discretion by the learned judge in appointing Mr. Sathiea as the receiver.

At the conclusion of submissions of learned counsel from both sides on 18 August 2004, we dismissed the appeal with costs. The reasons for our decision now follow.

The Law

Order 30 r. 1(1) of the RHC states that an application for the appointment of a receiver may be made by summons or motion. The power to appoint receivers is provided in item 6 of the Schedule to the Courts of Judicature Act 1964 (Act 91). The appointment of a receiver is one of the means for interim preservation of property while a cause or matter is pending and where the Court deems it unreasonable for either party to the proceedings to undertake the management of the property (*Malaysian High Court Practice* – 2001 Desk Edition pp. 1040-1060).

In *Corporate Receivership – The Law and Practice in Malaysia and Singapore* 1997 at pp. 417-418, the learned authors set out the procedure for the application for the appointment of a receiver. This is what they say

> The application for the appointment should wherever possible **name the person** proposed to be appointed receiver, and should include the nominee's **consent to act.** Although not essential, such applications are accompanied by an affidavit verifying his fitness to act. The affidavit of fitness should be deposed by a solicitor or other professional person who knows the nominee personally, but not by solicitors acting for the plaintiff or the proposed receiver in the action. An affidavit of fitness sworn by a professional accountant who knows the nominee personally would be in order.
>
> The **affidavit of fitness** should describe both the deponent and the nominee accurately, for an inaccurate or misleading affidavit of fitness represents a ground for the discharge of the receiver. An undertaking from the proposed receiver to give such security as may be required by the court can be included in the application, but there is no strict requirement for such an undertaking to be given before an appointment can be ordered.
>
> The omission from the application of such details or documents as the name of the proposed receiver or affidavits evidencing his willingness and fitness to act or his undertaking to give security does not vitiate the application. What is important is that the identity of the proposed receiver should be made known to the court at the time the order of appointment is made, supported by the evidence of his fitness and willingness to act. (emphasis added)

The evidence of identity, fitness and willingness to act of the proposed receiver is important in an application for the appointment of a receiver. Siti Norma Yaakob J (as she then was) in *Lee Choo Yam Holdings Sdn Bhd & 2 Ors v. Khoo Yoke Wah & 6 Ors* [1989] 2 CLJ 52; [1989] 1 CLJ 946, in finding that such evidence was lacking in that case, allowed the plaintiff to file and serve a supplementary affidavit evidencing such evidence before approving the appointment.

The appointment of a receiver is a matter resting in the discretion of the court, and that discretion ought to be exercised fairly and in the interest of the parties. But before the discretion could be exercised, sufficient materials must be placed before the court to enable the court to exercise the discretion.

It is an established principle of law that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised in a contrary way or that there has been a miscarriage of justice (*Ratnam v. Cumarasamy & Anor* [1965] MLJ 228). And an appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere "measuring cast" or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Vasudevan v. T. Damodaran & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101).

The Findings

Taking into account all the relevant principles and circumstances of this case, we found that there were sufficient materials before the court to support the learned judge's finding. Apart from affidavit of fitness, the affidavits evidencing the identity and willingness to act of the proposed receiver had been filed. Though there was no affidavit of fitness deposed by a solicitor or other professional person who knows Mr. Sathiea personally filed to support the application, we were of the view that the evidence disclosed in the supporting affidavits of 2nd, 3rd and 4th respondents were sufficient proof to establish that Mr. Sathiea was a qualified and a fit person to be appointed as the receiver. And the failure to file an affidavit of his fitness did not vitiate the appointment. The facts that he was a partner of the accounting firm of Anuarul Azizan Chew & Co, a member of the Malaysian Institute of Accountants and the holder of a Liquidator's license issued pursuant to s. 8(3) of the Act by the

Minister of Finance had not been challenged. Neither was there any evidence to show that Mr. Sathiea was not competent and an independent person and that by appointing him, such appointment would not ensure an independent appointment and an objective assessment, valuation and distribution of the properties. The fear of the appellant of any impartiality was therefore misplaced as the receiver is policed by the court and all parties are at liberty to apply to the court for any directions and orders should the need arise.

In terms of suitability of the choice of receiver and the economic factor, we agreed with the respondents that Mr. Sathiea remained the most suitable candidate in the interest of all parties. His fees were reasonable given the scope of work in this case compared to the appellant's candidates whose fees were uncertain and based on time costs.

Conclusion

Thus, it is our finding that the learned judge was wholly correct in the exercise of his discretion and we found no reason to interfere with his decision in appointing Mr. Sathiea as the receiver in preference to the candidates proposed by the appellant in the present case.

Accordingly, we dismissed the appeal with costs to the 2nd, 3rd and 4th respondents and affirmed the orders of the learned judge. We ordered that the deposit be paid to the respondents equally to account of their taxed costs.